No. 82-2059

In The

Supreme Court Of The United States

OCTOBER TERM, 1982

JOHN R. BARTLETT, JR. and FARVIEW BUILDERS CORPORATION OF CONNECTICUT,
Appellants,

v.

BURCH WILLIAMS, JUDITH W. GIBBONS, and SUZANNE W. LaPRADE,
Appellees.

ON APPEAL FROM THE
CONNECTICUT SUPREME COURT

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, cont.

Statutes

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The Appellees respectfully move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Connecticut Supreme Court on the

ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment require, in addition to timely notice and opportunity for a prompt evidentiary hearing provided to an affected real property owner by a lis pendens statute, that the statute also provide for bonding or some other mechanism whereby the owner may substitute security to obtain a release of the real property from the lis pendens?

2. Is the due process clause of the Fourteenth Amendment satisfied by a lis pendens statute that provides the affected real property owner with both timely notice of the recording of the

lis pendens and an opportunity for a prompt evidentiary hearing before a judge on the validity of the plaintiff's claim?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appellants' Jurisdictional Statement sufficiently sets forth the text of the constitutional and statutory provisions involved in this appeal, with the following two exceptions.

Section 1(c) of Connecticut Public Act 81-8 (now codified at Conn. Gen. Stat. § 52-325(c) (1983)) provides in full as follows:

> (c) Notwithstanding the provisions of subsection (a) no recorded notice of lis pendens shall be valid or constitute constructive notice thereof unless the party recording such notice, not later than thirty days after such recording, serves a true and attested copy of the recorded notice of lis pendens upon the

> owner of record of the property affected thereby. The notice shall be served upon the owner, if he resides in the same town in which the real property is located, by any indifferent person, by leaving a true and attested copy of such recorded notice with him or at his usual place of abode. If the property owner does not reside in such town, such copy may be served by any indifferent person, by mailing such copy, by registered or certified mail, to the owner at the place where he resides. If such copy is returned unclaimed, notice to such property owner shall be given by publication in accordance with the provisions of section 1-2. When there are two or more property owners of record, a true and attested copy of such recorded notice shall be so served on each property owner. A certified copy of the recorded notice of lis pendens, with the return of the person who served it, endorsed thereon, shall be returned to the party who recorded such notice.

Section 3(a) of Connecticut Public Act 81-8 (now codified at Conn. Gen. Stat. § 52-325b(a) (1983)), as quoted in the Appellants' Jurisdictional Statement, contains a typographical error. The word "appeal" therein should read "appear."

STATEMENT OF THE CASE

This is an appeal from the judgment of the Connecticut Supreme Court entered on March 15, 1983, finding no error in the trial court's denial of an application by the Appellants to discharge a notice of lis pendens that had been filed by the Appellees upon their commencement of the underlying action here. The facts material to consideration of the questions presented are set forth in the opinion of the Connecticut Supreme Court, on pages 11-14 and 20-23 of the Appendix to the Appellants' Jurisdictional Statement.

The Appellants, without benefit of citation to the record below, have made additional factual claims. (Jurisdictional Statement, at p. 7.) The Appellees respectfully urge that these claims be disregarded. They are immaterial

and irrelevant to the narrow issue presented by this appeal. Moreover, they are misleading: despite the Appellants' assertion that the real properties involved here were held by the partnership with the intent of selling them at a profit, the uncontroverted evidence at the hearing below showed that the partnership had never once been either a grantee or grantor of any parcel of land, and that in 27 of the 28 sales of Connecticut real property rightfully belonging to the partnership, the grantor was either Appellant Bartlett or some other entity controlled by him. (Transcript of Lis Pendens Hearing (Tr.), June 22, 1981, at pp. 6-8, 44-45.)

In addition, the Appellees respectfully wish to correct a serious error found in the section of the Juris-

dictional Statement titled "Jurisdiction." Contrary to the Appellants' representation on page 2 that "[t]he trial court has ordered that a judgment of dismissal enter on June 10, 1983 for lack of diligence in prosecution," no such judgment of dismissal was or has been entered. In fact, this action was exempted by the trial court, sua sponte, on February 3, 1983, from the Connecticut judicial system's dormancy program, due to the pendency of the Appellants' own appeal to the state's highest court, from whence the instant appeal followed. On June 21, 1983, the trial court issued two rulings denying motions addressed to the pleadings that had been filed by the Appellants and by their co-defendant below, FWZ, Ltd., thus allowing the underlying action to proceed.

ARGUMENT

A. This Court Lacks Jurisdiction to Consider the Question Presented by the Appellants.

It is well settled that "unless a federal question was raised and decided in the state court below, '[this Court's] appellate jurisdiction fails.'" Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), quoting Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391 (1836). While the Appellees are uncertain as to precisely what question the Appellants seek to have this Court decide, it appears that the question presented in their Jurisdictional Statement is far broader than that actually presented to and decided by the Connecticut state courts.

The only issue with which the Appellants have been concerned until now is the lack of a bonding provision or

some other mechanism in the challenged lis pendens statute whereby an owner of real property may substitute security to obtain a release of the property from the lis pendens. An examination of the particularity with which counsel for the Appellants framed the issue in the state courts will immediately highlight the comparative breadth and lack of clarity in the question presented here.

Appellants' constitutional argument in the trial court consisted entirely of the following:

> The last point, your Honor, is that it appears that, under the circumstances here, the lis pendens would seem to deny a property holder Defendant due process in that there is no opportunity to bond out from under it, as in the domestic relations lis pendens. This is an ongoing business for purposes of which is to transfer properties to make a profit, and to make money on inventory. I don't believe that lis pendens statute is meant to cover these circumstances. The real estate here is not unique to

the parties. (Tr., June 22, 1981, at p. 57) (emphasis added).

Similarly, in their brief to the Connecticut Supreme Court, the Appellants contended:

> The lis pendens procedure authorized by 81 P.A. 8 provides for a taking of real property for an indeterminate period of time pending the outcome of litigation. It provides for a judicial determination of probable cause, after the fact, but does not protect the owner, by bond or otherwise, against damages from an unsupportable action "intended to affect real property". Such a protection appears to fall within the general constitutional due process requirements as enunciated by this Court in Roundhouse Construction Corporation v. Telesco Masons Supplies Co. (1975) 168 Conn. 371, 382.
>
> Conversely, the filing of a lis pendens without an opportunity to free the property by substituting security, is a taking of property by State authority and is within the purview of the Due Process Clause of both the federal and state constitutions. . . .
>
> . . . [I]t should be incumbent upon the party burdening property with a notice of lis pendens to show the novelty of the res so as

> to justify the lis pendens procedure absent a bonding provision. Otherwise, the present scheme seems to transgress current notions of due process. (Brief of Defendant-Appellants at p. 6, Williams v. Bartlett, 189 Conn. 471 (1983) (footnote and citations omitted) (emphasis added)).

The Connecticut Supreme Court, which heard oral argument in the case, quite obviously understood the narrow scope of the Appellants' issue on appeal, stating:

> The defendants first contest the constitutional validity of the lis pendens statute, § 52-325, as amended by Public Acts 1981, No. 81-8. They argue that the act, which provides only for a post-filing hearing and does not contain a bonding provision or any other mechanism whereby the property owner may substitute security to obtain release of the lis pendens, in [sic] constitutionally infirm under principles of procedural due process. We disagree. (Appendix to Jurisdictional Statement, at pp. 14-15 (footnote omitted) (emphasis added)).

The Connecticut Supreme Court then reviewed the relevant case law to deter-

mine whether due process required the mechanisms for which the Appellants contended, and answered in the negative:

> Because Public Acts 1981, No. 81-8, provides a property owner with a hearing "at a meaningful time and in a meaningful manner" . . . we do not construe the absence of a bonding provision as rendering the statute constitutionally infirm. Indeed, because of the uniqueness of real property, substituting security to obtain the release of a lis pendens might impair the adequacy of the remedy for the successful litigant. (Appendix to Jurisdictional Statement, at p. 20 n.5 (citations omitted) (emphasis added)).

The question presented by the Appellants to this Court is ambiguous in that it gives no hint of what additional process the Appellants contend is due them. As currently framed, the Appellants could argue here for a veritable multitude of "protections" never mentioned by them below and on which the state courts have had no opportunity to

pass. For this reason, the Appellees respectfully submit that this Court lacks jurisdiction to consider this appeal and that the appeal should therefore be dismissed.

B. The Appeal Should Be Dismissed For Want of a Substantial Federal Question.

Even if the question raised by the Appellants is narrowly construed so as to favor jurisdiction here, their appeal presents no substantial federal question not previously decided by this Court. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223,

233 (1864).

"Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In no case, however, has this Court suggested that a due process decision turned on anything but the timing, quality and integrity of the notice and hearing afforded by the state to an affected party.

The Appellants argue that a bonding or similar substituted security device rises to the level of constitutional necessity in a lis pendens statute, even where, as in this case, the statute provides for timely notice and a prompt evidentiary hearing before a judge at which the plaintiff bears the burden of establishing probable cause to sustain the validity of his or her claim. The

Appellants' contention twists the flexible concept of due process beyond recognition. They would have this Court, in effect, rewrite decades of firmly established law holding that due process requires only notice calculated to inform the recipient of the pending matter or proceeding, see Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950), and "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" Parratt v. Taylor, 451 U.S. 527, 540 (1981), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

"[T]he two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process."

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). With respect to the first of these concerns, substitution of a bond or other security by the Appellants would not prevent a deprivation; it would merely permit the Appellants conveniently to select the property of which they choose to deprive themselves. By contrast, notice and the opportunity for a hearing are truly the mechanisms by which unjustified or mistaken deprivations may be prevented.

With respect to the second due process concern -- "promotion of participation and dialogue by affected individuals in the decisionmaking process," Marshall v. Jerrico, Inc., supra, 446 U.S. at 242 -- these Appellants in particular are in no position to complain. In spite of the fact that the hearing below was held at their request and despite

the judge's implication that Appellant Bartlett's attendance would be appropriate, Bartlett did not appear. (Tr., June 15, 1981, at p. 10; see Appendix to Jurisdictional Statement, at pp. 22-23). As a result, the only evidence presented at the hearing came from the testimony of Appellee Williams, whom the trial court explicitly found to be "a very honest individual and quite candid." (Tr., June 22, 1981, at p. 60; see Appendix to Jurisdictional Statement, at pp. 22-23).

Viewed against this background, it is ironic that the Appellants now argue that the hearing held below provided them with insufficient protection. In these circumstances, the Appellants are peculiarly unworthy of this Court's attention and its valuable, limited time. Given the plethora of cases

holding that due process requires only notice and the opportunity for a meaningful hearing, the Appellants' failure to take full advantage of the process already afforded them, and the absence of any congruence between the additional measures they seek and the core concerns of the due process clause, this appeal should be dismissed for want of a substantial federal question.

C. The Connecticut Lis Pendens Statute Provides Due Process of Law.

Even if this Court finds that it has jurisdiction to consider this appeal, the decision below should be affirmed on the merits. The particular requirements of due process in a given case are determined by the test this Court set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), not cited by the Appellants in their Jurisdictional Statement. Three

factors are balanced in this test:

> first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

The private interests affected by a notice of lis pendens are those of the real property's owner of record and the plaintiff in the underlying suit. When a notice of lis pendens is filed, the ability of the record owner to alienate or encumber the land is diminished. This loss, though real, is nevertheless quite limited.

First, any deprivation is far from total. Unlike the plaintiffs in Fuentes v. Shevin, supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419

U.S. 601 (1975), the owner of record here retains full use and possession of the property until the underlying claim is resolved. As the Connecticut Supreme Court pointed out, the deprivation "is at all times nonpossessory." (Appendix to Jurisdictional Statement, at p. 18). (For this reason, it is incorrect for the Appellants to refer to the lis pendens as effecting a "sequestration" of property.)

Moreover, as the Connecticut Supreme Court recognized, the type of property in question here is not "property essential to meet the owner's basic needs." (Appendix to Jurisdictional Statement, at p. 18). Hence, the instant case is distinguishable from Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wages).

Finally, by providing for a prompt

judicial hearing on the legitimacy of the lis pendens notice, the Connecticut statute ensures that any wrongful deprivation will be of very short duration. In sum, the interest of the owner of record in a notice of lis pendens when first filed is relatively minor.

By comparison, the plaintiff's interest in the lis pendens procedure is substantial. As this Court recognized in Mitchell v. W.T. Grant Co., 416 U.S. 600, 608-09 (1974), there is a "real risk" in cases of disputed ownership that the party in possession of the property "will conceal or transfer [it] to the damage of the [claimant]." The consequences of such a wrongful transfer are greatest when, as here, the disputed property is real estate, which, by definition, is unique. The Connecticut Supreme Court so held, as a matter of

state law, in this very case. (Appendix to Jurisdictional Statement, at pp. 18-19, 20 n.5). Hence, the minimal adverse impact of a lis pendens notice on record owners is heavily outweighed by the protection it affords claimants.

The Connecticut lis pendens statute is also sensitive to the risk of erroneous deprivation. It requires that formal notice be served upon a resident property owner, in the same manner as is required for the commencement of a lawsuit in Connecticut, within thirty days of the recording of a notice of lis pendens. P.A. 81-8, § 1(c) (now codified at Conn. Gen. Stat. § 52-325(c) (1983)). A non-resident owner must be served, within thirty days as well, by registered or certified mail. Id. The statute allows the owner of record immediately to file

an application in the Connecticut Superior Court for discharge of the lis pendens. Id. § 2 (now codified at Conn. Gen. Stat. § 52-325a (1983)). Indeed, a hearing may be requested and held even before the plaintiff's writ, summons and complaint are returned to court. Id. § 2(a) (now codified at Conn. Gen. Stat. § 52-325a(a) (1983)). At the hearing on such application, the plaintiff bears the burden of establishing "that there is probable cause to sustain the validity of his claim." Id. § 3(a) (now codified at Conn. Gen. Stat. § 52-325b(a) (1983)). Thus, a full evidentiary hearing is made available to the record owner in a timely fashion, minimizing the duration of any deprivation caused by an erroneously filed notice of lis pendens.

In addition, the Connecticut statutory scheme strongly discourages the

incidence of wrongful lis pendens deprivations. Because the plaintiff must give prompt notice of the lis pendens and, if challenged, demonstrate its legitimacy to a judge, a plaintiff who records a notice of lis pendens on insufficient grounds gains nothing. And, by allowing recovery for abuse of process, Varga v. Pareles, 137 Conn. 663, 667 (1951); see Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475 (1980), Connecticut common law provides a positive disincentive to the improper filing of lis pendens notices.

Furthermore, the value of additional procedures in the context of this case is minimal. Bonding is simply not a material component of due process, see Section B, supra, and would undercut the function of the lis pendens itself by allowing the substitution of money for

the unique land supposedly protected by the lis pendens notice. The unavailability of a hearing until after the notice of lis pendens has been recorded is likewise not determinative here. As this Court recently explained:

> [W]e have rejected the proposition that [being heard] "at a meaningful time and in a meaningful manner" always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing . . . and the assumption that at some time a full and meaningful hearing will be available. Parratt v. Taylor, supra, 451 U.S. at 540-41 (emphasis in original).

This is precisely such a case. The primary purpose of the lis pendens procedure is to protect the claimant's interest in land involved in a legal dispute. Requiring notice and a hearing prior to recording a lis pendens would invite the very transfer that would de-

feat that interest. Furthermore, as detailed above, Connecticut promptly provides the affected property owner with a "full and meaningful hearing."

Finally, the state has a significant interest in retaining the current lis pendens procedure. Absent some method of securing real property until the dispute in which it is involved is resolved, the rights of plaintiffs and third-party purchasers alike would be thrown into confusion. Connecticut clearly has the right to use reasonable means to prevent such uncertainty. See Appendix to Jurisdictional Statement, at p. 19.

In sum, while the existing lis pendens process exposes the property owner of record to a limited risk of mistaken deprivation, that potential deprivation is of minor and short-lived

nature. Meanwhile, the statute at issue here protects important interests of both the plaintiff and the state. Eliminating the risk to the property owner would destroy this protection, and thus, defeat the very purpose of the lis pendens statute. For these reasons, additional procedures are not required by the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Appellees respectfully submit that this appeal should be dismissed or, in the alternative, that the judgment of the Connecticut Supreme Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing were mailed, first class postage prepaid, to Donald A. Mitchell, Esquire, Attorney for the Appellants, P.O. Box 119, Danbury, Connecticut 06810, this 8th day of July, 1983.

/s/ Alan J. Roth
Attorney